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AUG 30 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 292

HAL R. COX, ALYCE LEE COX, FLOYD CALDWELL, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EDWIN MECHEM,
W. C. WHATLEY,
LAFEL E. OMAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on June 21, 1951 in causes 4148 and 4201 of that Court, which causes were consolidated by the Court for appeal purposes.

Opinions Below

The District Court did not write an opinion.

The opinion of the Court of Appeals for the Tenth Circuit (R. *1-13) is not reported as yet.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on June 21, 1951. An order denying

petition for rehearing was entered on July 31, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

Questions Presented

1. Whether, in the determination of just compensation for grazing lands taken by the United States of America through condemnation proceedings, it is competent to consider the availability and accessibility of the public domain adjacent thereto and which theretofore had been administered under the Taylor Grazing Act of June 28, 1934, and used in conjunction with the grazing lands taken under a permit issued by the Secretary of the Interior.

2. Whether it is competent to use the formulae generally adopted and accepted by private individuals in arriving at the fair market value of a livestock ranch in the determination of just compensation for grazing lands taken by the United States of America through condemnation proceedings, when such grazing lands so taken have been used and developed, in conjunction with the adjacent public domain, as a livestock ranching unit, under a permit issued by the Secretary of the Interior in the administration of the public domain under the Taylor Grazing Act of June 28, 1934.

3. What is the measure of just compensation for grazing lands taken by the United States of America through condemnation proceedings, when the grazing lands so taken have been used and developed in connection with the public domain, under a permit from the Secretary of the Interior in the administration of the public domain under the Taylor Grazing Act of June 28, 1934, as a livestock ranching unit, and the United States of America, coincidental with the taking by condemnation, withdraws its permit to graze the public domain?

Statute Involved

1. Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1270, amended August 6, 1947, 61 Stat. 790, 43 U. S. C. Sec. 315 (b), provides:

> "The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. * * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them. * * *. No permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this act shall not create any right, title, interest or estate in or to the lands."

2. The Act of July 9, 1942, 56 Stat. 654, 43 U. S. C. Sec. 315 (q), provides:

> "That whenever use for war purposes of the public domain or other property owned by or under the con-

trol of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be cancelled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States."

Statement

The United States of America on April 3, 1945, instituted proceedings in the United States District Court for the District of New Mexico, being civil cause No. 834, to condemn 556,032 acres of land in Dona Ana and Otero Counties, New Mexico for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the national emergency, for use in connection with the White Sands Proving Grounds, Fort Bliss area. (R. 3-7, 18, cause No. 4148; R. 1-5, 8, 19, cause No. 4201) The lands were described by exterior boundaries (R. 4-5, cause No. 4148; R. 3-4, cause No. 4201), and for the most part consisted of the public domain to which private persons held grazing permits under the Taylor Grazing Act. The permittees, amongst whom were the petitioners, owned adjacent lands in fee or held leasehold estates from the State of New Mexico in adjoining lands, and had developed their privately owned or leasehold lands and the Taylor Grazing permit lands into livestock ranching units. (R. 73, 74, 76, 82, cause No. 4148; R. 43, 44, 51, 52, 53, 47, cause No. 4201)

On October 16, 1946, the United States of America filed civil cause No. 1149 in the United States District Court for the District of New Mexico by which it sought to condemn

the fee title and leasehold estates to 427,120.98 acres, including the lands here involved. (R. 34-39, cause No. 4148; R. 29-34, cause No. 4201) These lands were in general the same lands embraced in cause No. 834 and were likewise described by exterior boundaries. (R. 35-37, cause No. 4148; R. 30-32, cause No. 4201) The petition in this cause did contain the allegation that a large portion of the lands were then owned by the United States and that it did not, by the institution of that proceeding, admit the existence of any rights in such public lands in favor of any of the named defendants or any other person whomsoever. (R. 38, cause No. 4148; R. 33, cause No. 4201)

The title to and possession of the lands were taken and commissioners appointed by the Court made awards both for rentals and for the taking. (R. 26-27, 29-30, 62-63, 65-67, cause No. 4148; R. 25-26, 40, cause No. 4201) The Government thereupon appealed from these awards and the causes were tried to the juries and judgments entered in accordance with the verdicts.

The trial court in cause No. 834 Civil entered its pretrial order on September 19, 1949, ordering that the issue to be tried in that cause was the reasonable rental value of the property of the defendants, described in the petition, between July 1, 1945, and October 16, 1946, in arriving at which the jury would be instructed that it would take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which each such ranch was held, and any other factor which may and is usually used and considered between private individuals in leasing or renting such ranches; to all of which the plaintiff by its attorneys duly excepted. (R. 73, cause No. 4148; R. 43, cause No. 4201)

The trial court in cause No. 1149 Civil entered its pretrial order on September 19, 1949, ordering that the issue

to be tried in that cause was the reasonable value of the property of the defendants, described in the petition, on October 16, 1946, in arriving at which the jury would be instructed that it would take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which each of said ranches was held, and any other factor which may and usually is used and considered between private individuals in buying and selling such ranches; to all of which the plaintiff by its attorneys duly excepted. (R. 74, cause No. 4148; R. 44, cause No. 4201)

The issues thus defined by the trial court were tried and the witnesses both for the plaintiff and the defendants, in estimating the rentals and reasonable values of the respective ranches, regarded each as a ranching unit, and were permitted, in arriving at their estimations of these values, to apply the formulae and take into consideration the elements ordinarily and customarily considered in arriving at the market value of livestock ranches. The Government witnesses, however, in giving their estimates of these values first estimated the value of the entire ranching unit and then allocated to the lands taken the portion thereof which they felt the state lease and fee lands contributed to the ranching unit. (R. 378-382, cause No. 4148; R. 162-164, cause No. 4201) The jury in each case was instructed that it could not make awards for the grazing permits to graze the Federal domain, but that it could and should consider the availability of the Federally owned land and what value, if any, its accessibility or availability actually added to the privately owned land and state leasehold interests. (R. 389, cause No. 4148; R. 175, cause No. 4201)

The verdicts of the juries were returned and the Court entered judgments in accordance therewith. The judgment

in cause No. 4148 was entered on April 25, 1950, (R. 77-81) and in cause No. 4201 on June 27, 1950. (R. 47-51)

The Government then took an appeal in both cases to the United States Court of Appeals for the Tenth Circuit, which Court consolidated the cases for the appeal. The opinion and judgments of this Court were entered on June 21, 1951, (R. *1-14) and an order denying the appellees' petition for rehearing was entered on July 31, 1951. (R. *18) On August 8, 1951, orders of the Court were entered staying the mandates of the said Court for a period of thirty days from August 10, 1951. (R. *18)

Specification of Errors to Be Urged

The United States Court of Appeals for the Tenth Circuit erred:

1. In holding that the availability and accessibility of the Federal domain cannot be considered in the determination of just compensation for the property taken.

2. In holding that the formulae and elements customarily and ordinarily used and considered by private individuals in arriving at the fair market value of a ranch as an economic unit cannot be applied or considered in the determination of just compensation for a ranch taken, when part of the ranching unit consists of public domain used under permit from the Secretary of the Interior and the Government cancels its permit coincidental with the taking.

3. In holding that a declaration of taking in condemnation proceedings operates to cancel permits to graze the public domain issued by the Secretary of the Interior in the administration of the Taylor Grazing Act of June 28, 1934, when the declaration of taking includes the public domain covered by such permits as well as the base fee and leasehold lands.

4. In reversing the judgments of the District Court.

Reasons for Granting the Writ

These cases clearly involve principles, the settlement of which is of importance to the public as distinguished from that of the parties herein. This appears to be a case of first impression and the Court of Appeals for the Tenth Circuit which reversed the judgments of the District Court was divided in its opinion. Because of the steadily increasing number and size of defense projects and other Governmental projects in all the Western States wherein lie great areas of public domain administered by the Secretary of the Interior under the Taylor Grazing Act of June 28, 1934, and by other Governmental departments and agencies, the settlement of the principles involved in these cases is of utmost importance to the entire ranching industry of the West. The effect of the opinion of the Court of Appeals for the Tenth Circuit is to make uncertain the measure of just compensation for the livestock ranches taken by the United States of America through condemnation proceedings when the ranches have been used and developed as such in conjunction with the use of the Federal domain.

The livestock ranching industry has been and will continue to be depressed and in a state of uncertainty, especially in areas of expanding Gevernmental installations, until this Court has settled the principles herein involved. This Court has in many cases defined just compensation and has repeatedly held that the market value of the property is to be determined as of the time of the taking. *Seaboard Air Line Ry. Company* v. *United States,* 261 U. S. 299, 304; *Jacobs* v. *United States,* 290 U. S. 13, 17; *Olson* v. *United States,* 292 U. S. 246, 255; *United States* v. *Klamath and Moadoc Tribes of Indians,* 304 U. S. 119, 123; *Danforth* v. *United States,* 308 U. S. 271, 283; *United States* v. *Miller,* 317 U. S. 369, 373, 374. But we are here confronted with the

question of what elements or considerations are to enter into the determination of just compensation for a livestock ranch, which has been developed and used in conjunction with a permit to graze the public domain, and this question has never been decided by this Court.

As pointed out by the Honorable Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit, in his dissenting opinion: "The hardy pioneers who settled the semi-arid West early learned that ample water for livestock was of paramount importance. Hence, they acquired by homesteading and by purchase, tracts of land where water supply from streams, springs, and wells could be developed that would enable them to carry not only the livestock that could be grazed on their privately-owned lands, but many more livestock that could be grazed on adjacent public domain where grass was abundant, but little water available. By controlling the lands which would supply water they controlled the use of the adjacent public domain. Enduring privations, suffering hardships, and encountering grave dangers, these settlers developed livestock raising enterprises that provided them with homes and a means of livelihood. They first used the public domain under an implied license. Ultimately, they utilized the public domain under preferential permits issued under the Taylor Grazing Act. * * * In valuing privately-owned ranch properties which control available water supply in the semi-arid West, buyers and sellers for many years have taken into consideration the availability and accessibility of public lands which can be utilized in connection with the privately-owned lands and water under preferential grazing privileges. Without available water supply to provide drink for livestock grazing on public domain, the public lands are of little value. But, their availability and accessibility for use in connection with private lands which control the water

supply substantially increase the value of the privately-owned lands."

However, under the opinion of that Court, the United States of America, if it take privately owned ranch properties by condemnation, need compensate only for such, considered as completely isolated tracts, without regard for the availability and accessibility of the public domain and without regard for their development as economic ranching units. The fair market value of such ranching units is not to be considered.

Since a large portion of the ranching units in the Western states have been developed in conjunction with the use of the public domain and such use is of generally recognized public importance and benefit, the entire ranching industry and the entire public are vitally interested in and concerned with the settlement of the principles herein involved.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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